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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-372

BRIAN O'DONNELL, KALMON YUDKOWSKY, RONALD D'ELIA, ROLAND GOZLAND, PATSY BARILE, JOSEPH FUCHS, ROBERT LANGELIUS, LEON J. GREENSPAN, CARL BOCHTERLE, EZRA BERKOWITZ, JEFFREY SILVERBUSH, LOUIS EHRENKRANZ, MARTIN TANNENBAUM,

Appellants,

against

ARTHUR A. ANTIN and WHITE PLAINS BOARD OF EDUCATION,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM BY LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, INTERVENOR *PRO SE*

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MOTION TO DISMISS OR AFFIRM BY LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, INTERVENOR *PRO SE*

The Attorney General of the State of New York, Intervenor *pro se*, moves, pursuant to this Court's Rule 16, for dismissal of this appeal for want of a substantial Federal or constitutional question, or that the judgment of the New York Court of Appeals be affirmed.

The Attorney General was requested by Hon. John C. Marbach, Justice of the Supreme Court of the State of

New York, to submit a Memorandum of Law in the action (Jurisdictional Statement, p. 5a). The Attorney General did so. The Court of Appeals of the State of New York by order made September 12, 1974, granted the Attorney General formal leave to intervene in his statutory capacity under New York's Executive Law, Section 71, to uphold the constitutionality of the state statute here attacked.

Opinions Below

The decision of the New York Court of Appeals is not yet reported. It is reproduced at page 1a of the Jurisdictional Statement.

The judgment and opinion of Justice Marbach is reported at 81 Misc 2d 849 but not yet otherwise reported. It is reproduced at pp. 2a-11a of the Jurisdictional Statement.

There were earlier opinions of the Appellate Division and of Justice W. Vincent Grady on the plaintiffs' application for a preliminary injunction which are reproduced at pp. 12a-17a of the Jurisdictional Statement. The Appellate Division decision is reported at 43 A D 2d 699, 350 NYS 2d 611 (2nd Dept., 1973). The opinion of Justice Grady is not otherwise reported.

Statute Involved

Section 3635 of the Education Law of the State of New York is the statute involved. It is reproduced at pp. 18a-19a of the Jurisdictional Statement.

Question Presented

Non-city school districts are mandated by Section 3635 to provide transportation to all school children. City school districts are not required to offer transportation at all, but if they do elect to offer transportation, they are required to

offer it equally to all children in like circumstances.* Is this a denial of equal protection of the laws to children of residents of a city school district which does not provide transportation to children to any school *outside* the school district?

In the State Courts, the appellants had urged that the refusal of the School Board of White Plains to transport their children to parochial schools outside the White Plains City School District also infringed on their First Amendment freedom to exercise their religion. The Jurisdictional Statement makes no such claim but is confined solely to the question stated above.

Preliminary Statement

As we have noted, the appellants are not claiming here that the refusal of the White Plains City School Board to transport their children to parochial schools outside the White Plains District is an infringement of their religious freedom. The gravamen of their appeal is that there is a constitutional duty to provide transportation to schools outside the school district. School children attending public or parochial schools in the District are not affected since all such schools are within the White Plains City School District. Free transportation is available to children residing in White Plains to the public or parochial schools within White Plains. Jurisdictional Statement p. 16a.

While the State (and by delegation) its school districts may provide for bus transportation to school children whether attending public or private schools, *Everson* v.

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* This last phrase has been held by the State Education Department and the State Courts, as meaning that children living in and attending schools, public or parochial, within the city school district, are in "like circumstances". Jurisdictional Statement, pp. 7a-8a.

Board of Education, 330 U.S. 1 (1947), it is not bound to use its finite resources to provide such transportation to parochial school children attending such schools outside the school district. See *Norwood* v. *Harrison,* 413 U.S. 455, 471 (1973).

The action of the White Plains School Board in the present case was motivated by budgetary considerations. Jurisdictional Statement, p. 5a. The saving in refusing to transport the few students involved to parochial schools outside the School District was, in 1973, $50,000. Jurisdictional Statement, p. 5.

Appellants now seek to establish an Equal Protection claim of substance in the distinction made by the State's education law (Section 3635) which, as regards transportation, mandates that transportation be provided by non-city school districts but leave it optional with *city* school districts as to whether or not to provide transportation. The claim is singularly without merit since here White Plains has elected to provide such transportation to all children to *any* school in its city.

ARGUMENT

The distinction between non-city and city school districts as to their obligation to provide transportation under Education Law, Section 3635, is based on a reasonable and legitimate classification of school districts. It is not therefore a denial of the equal protection of the laws.

(1)

If a statutory scheme or classification has a reasonable basis and a legitimate objective, it is not a denial of equal protection. In *San Antonio School District* v. *Rodriguez,* 411 U.S. 1 (1973), reh. den. 411 U.S. 959, this Court upheld the Texas system of financing public schools; it held there was a rational basis for it although it was shown that the

result was wide-spread disparity in the *per capita* expenditure per pupil arising from the differences in the taxable wealth of the many Texas school districts.

If a classification has a reasonable basis it does not offend the Constitution because it is not made with mathematical nicety or because in practice it results in some inequity. *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970), restating the language used in *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61 (1911). See *McGinnis* v. *Royster,* 410 U.S. 263, 270 (1973).

The classes of school districts set up by the Legislature clearly reflect population densities in the various areas of the state. Not only are there differences between the organization and method of operation between non-city school districts (common, union free, central, etc.) and city school districts, but the latter classification is broken down into (1) city school districts of cities with 125,000 population or less (Article 51 of the Education Law) and (2) city school districts of the more populous cities; New York, Buffalo, Rochester, Syracuse, Yonkers and Albany (Art. 52). A special Article deals with the New York City School System, Article 52-A.

The number of members of the boards of education, the method of their election or appointment, the responsibilities of the chief administrator, such as district superintendents, superintendents of schools, the Chancellor of the New York City School system, etc., differ from each type of district to the other.

The fiscal relations between the political subdivisions of the state, the counties, cities, towns and villages, differ widely, reflecting again, the demographic facts.

The Legislature in dealing with a county like Essex County with an area of 1826 square miles or Franklin County with an area of 1685 square miles and total populations of less than 50,000 persons in each county is dealing

with an entirely different situation as regards the transportation of pupils than in dealing with Westchester County with an area of 435 square miles and a total population of about 900,000. That it should make different provisions for the thinly populated school districts of Essex or Franklin Counties than it makes for those in Westchester, is reasonable and justifiable.

State differentiation between its areas based on population density is a legitimate classification. *McGowan* v. *Maryland,* 366 U.S. 420 (1961). The state could even adopt a set of laws (the civil laws) for New York City and a different set of laws (the common laws) for the rest of the State without infringing on equal protection. *Missouri* v. *Lewis,* 101 U.S. 22, 31 (1879).

The creation of judicial districts which, it was claimed, resulted in malapportionment of judges and excessive delays to certain litigants was not a denial of equal protection. It was so held by a three-judge federal court in *Kail* v. *Rockefeller,* 275 F. Supp. 937 (E.D.N.Y., 1967). Territorial uniformity is not mandated by the Constitution. "There is no rule that counties, as counties, must be treated alike", a quotation from *Griffin* v. *County School Board,* 377 U.S. 218, 230 (1963), might be paraphrased in view of *San Antonio School District* v. *Rodriguez, supra,* as "There is no rule that school districts as school districts must be treated alike".•

Density and concentration of population leads to a demand for mass transportation within cities and to their sur-

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• In *Cartwright* v. *Sharpe,* 40 Wis. 2d 494, 162 N.W. 2d 5 (1966), the Supreme Court of Wisconsin had before it a statute which also distinguished between students residing in cities and those who did not, as regards the right to transportation. 162 N.W. 2d at p. 11. The Court upheld the distinction. While the Wisconsin statute is different in several ways from Section 3635 of the Education Law, the basic point, that the legislative classification is a reasonable one, was upheld.

rounding areas. The greater the population, the more extensive such local transportation system is likely to be. New York City has an enormous intra-city system.

While the smaller cities do not have so large a system, they do have local bus lines; rural communities are dependent for the most part on inter-city or inter-state bus lines which stop only at designated points in the area, if at all. The City of White Plains which according to the 1970 census had a population of 50,220 is served by local buses within the city and to several of the surrounding areas.

But the legislative determination that city school districts need not provide any transportation for school children at all, does not rest on the absence or presence of mass-transportation facilities, adequate or inadequate. The presence of such facilities may have been one factor. Other factors may have been the fact that city school districts are more compact—schools are nearer the children's homes—that "car pooling" by parents is easier to achieve and that city school districts tend to locate schools in residential areas, whereas non-city school districts tend to locate schools centrally in areas of convenient highway access. Cities usually have sidewalks, an abundance of traffic lights and police forces to cope with traffic.

(2)

Appellants urge that the distinction between city and non-city school districts is arbitrary and capricious because: (a) Certain city school districts embrace territory not within the city's own geographical limits and (b) Certain *non-city* school districts include territory within the territorial limits of cities. Jurisdictional Statement pp. 7-8.

The definition of a "city school district" is contained in Article 1, Section 2(16) (a) of the State's Education Law. It reads as follows:

"16. City school district. a. The following school districts are hereby designated and declared to be city school dis-

tricts: (1) Any school district coterminous with a city on January first, nineteen hundred fifty; (2) any school district part of which was without and part of which was within a city on January first, nineteen hundred fifty, and which then contained the whole or the greater portion of the children of the city between birth and eighteen years of age, as shown by the school census; and (3) any school district wholly within, but not coterminous with, a city on January first, nineteen hundred fifty, and which then contained the greater portion of the children of the city between birth and eighteen years of age, as shown by the school census.

b. Whenever a city shall be created after January first, nineteen hundred fifty, that school district shall be and become a city school district which, on the effective date of the incorporation of such city, is: (1) coterminous with the city; (2) partly without and partly within the city and then contains the whole or the greater portion of the children of the city between birth and eighteen years of age, as shown by the school census; or (3) wholly within but not coterminous with the city and then contains the greater portion of the children of the city between birth and eighteen years of age, as shown by the school census.

c. The corporate existence of any school district, which, by virtue of the provisions of this subdivision, shall be and become a city school district, shall continue, and any such school district thereafter shall be governed by the provisions of this chapter applicable to city school districts."

The essential component of a "city school district" in all three subdivisions of Section 2 (16)(a) is a *"city"*.

As of the Fall of 1974, there was a total of 62 city school districts in New York State out of a total of 738 operating school districts. Survey of Enrollment, Staff and School Housing, Fall 1974, State Education Department, p. 3.

There are 19 city school districts entirely within the respective cities' boundaries or in a few cases which are smaller than the city itself. These include the largest cities, New York, Buffalo, Syracuse, Rochester, Yonkers and Albany, and such cities as Utica, Rye, White Plains, Mt. Vernon, Glen Cove, Poughkeepsie and New Rochelle. Bureau of School District Organization, September 1974, City School Districts, Legal and Territorial Organization.

There are two city school districts which *ab initio* extended beyond the boundaries of the cities in which they are located and took in territory adjoining the cities, namely, Glens Falls and Niagara Falls (*Ibid.*).

There are 34 "Enlarged School Districts" (*Ibid.*). These are city school districts which the Commissioner of Education, under statutory authority granted him to consolidate school districts in cities of less than 125,000 population with such adjoining area or areas as, in his judgment, were suitable for consolidation, directed to be enlarged. Education Law, Sec. 1526.

The need for such enlargement arose from the general movement of central city populations into adjoining areas; the enlarged city school district served the consolidated areas better than either separate entity could. Economies could be effected; better facilities provided. Thus the Elmira City School District in Chemung County includes such contiguous areas as Pine City and Wellsbury; the Hudson City School District, the Newburgh City School District, and the Saratoga Springs City School District, include the contiguous suburban areas listed on page 8 of the Jurisdictional Statement. Such enlarged school districts are required to furnish transportation to children residing outside the city limits to the school they attend within the city school district—again a recognition that where population density is low, transportation is necessary. Education Law, Section 2503(12).

In a State with a long history, it is not surprising that over the years some small communities, seven in number, received city charters. These accidents of political history created a city such as the City of Sherrill, population in 1970, 2986. However the *school* population of Sherrill in 1974 was *3640* since the City School District of Sherrill embraces territory well beyond the small city limits.

All of the foregoing, even considering the anomaly of the City of Sherrill and other minor oddities in the State's school districts, do not detract from the fundamental fact; the Legislature in enacting Section 3635 was dealing in general with metropolitan and city areas and differentiating them from rural, non-city, areas in respect to the providing of transportation. The Legislature did not forbid the city school districts from furnishing transportation, but it did not require them to do so except as required under Section 2503(12) in the case of "Enlarged City School Districts". If a city school district embraced a relatively large area outside the core city, it was free to provide transportation but it was not mandated to do so. The Legislature of New York considered that the population density connoted by "City" in the designation of a school district's title justified the reasonable assumption that the area was one of population density. As respects the 62 City School Districts, the assumption, despite anomalies due to the accidents of political history, is justified. The fact that a classification is not made with mathematical nicety or results in some inequity does not offend the Constitution, if it is otherwise based on reason. *Dandridge* v. *Williams, supra; Lindley* v. *Natural Carbonic Gas Co., supra; McGinnis* v. *Royster, supra.* Lines drawn by a legislature frequently leave some matter out that might well have been included, but this is a legislative decision. *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 39 L. Ed. 2d 797; 94 S. Ct. 1536 (1974). In matters relating to population concentrations, a state government may prescribe substantive restrictions or provisions for one part

of the state and not for others. *Salsburg* v. *Maryland,* 346 U.S. 545 (1954). The division of the State into welfare districts by the Legislature resulting in an unequal distribution of public assistance costs as between the districts was upheld as a legitimate division, despite any inequality. *Lindsay* v. *Wyman,* 372 F. Supp. 1360 (S.D.N.Y. 1974), affd. *sub nom. Beame* v. *Lavine,* —— U.S. ——, 95 S. Ct. 21 (1974).

The reference to the population of towns and villages, both incorporated and unincorporated, at page 9 of the Jurisdictional Statement, is not a relevant one. The principal *political* subdivision of the State is the county—there are 62 in the State. The principal *political* subdivisions of the county are the cities and "towns". Within a town, there may be several incorporated villages; parts of the rest of the town are sometimes referred to as unincorporated villages. School districts are separate *educational* entities not related to the political entities such as the counties, towns or villages. That some towns or villages may have greater populations than some cities, is not relevant. It is not population that is determinative, it is population *density.*

(3)

Manifest factual error in a Jurisdictional Statement to this Court, even if such error is unimportant, should not go uncorrected. It is not true as alleged on page 7 of the Jurisdictional Statement that the City School Districts of White Plains, New Rochelle, Yonkers and Mt. Vernon overlap into surrounding areas. Our statement is based on an examination of the maps of the respective city school districts. These school districts are co-terminus with their respective city boundaries.

(4)

A statute which permits a City School District's Board of Education to decide whether, or how much, transporta-

tion should be provided to its students in the light of its budget, the availability of public transportation, the location of its schools and of the residences of its school population, is a reasonable one. The difference in the statute between city school districts and non-city school districts is based on differences in the nature of the two types of school districts and is a reasonable one. The distinction drawn by the statute bears a reasonable relation to a legitimate state end. *McDonald* v. *Board of Elections*, 394 U.S. 802, 809 (1969).

CONCLUSION

The judgment below should be affirmed, or, in the alternative, the appeal be dismissed.

Dated: New York, New York, September 29, 1975.

Respectfully submitted,

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